MEMORANDUM

To: A.D.A. Bill Melkonian
From: A.D.A. Kenneth Bresler
Date: July 30, 2009
Re: *Melendez-Diaz* and BT maintenance records

Melendez-Diaz states:

> [W]e do not hold, and *it is not the case, that anyone whose testimony may be relevant in establishing the...accuracy of the testing device, must appear in person* as part of the prosecution's case.

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532 n.1 (2009)(emphasis added).

This is much stronger than the language that appears in the same footnote later: "[D]ocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." *Id.* (citing later pages).[1] However, that language is beneficial, too, when one refers to the cited pages.[2]

Melendez-Diaz goes on to state:

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. *See* Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.

Id. at 2538. Maintenance records are not regularly kept for use at trial, because they are not regularly introduced at trial. Therefore, the first sentence in the quotation above controls.

In addition,

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[1] The page citation in Westlaw, 2550-2551, 2552,is almost certainly incorrect as of this date. The citation almost certainly should be 2538-39, 2539-40. Westlaw's citations land the reader in the *dissent*, and Scalia is not referring to the dissent in this part of his note 1. (When he *does* refer to the dissent at the beginning of the note, he uses "*post*," not "*infra*," and refers specifically to "opinion of Kennedy, J.") The pagination for the case on the Supreme Court's website is different. Both the majority opinion and dissent begin with a page 1. www.supremecourtus.gov/opinions/08pdf/07-591.pdf. When Scalia wrote at the end of his note 1, "See *infra*, at 15-16, 18," he was almost certainly referring to pages in his opinion, not pages with the same number in the dissenting opinion.

[2] See previous note.

> The early common-law cases likewise involve records prepared for the administration of an entity's affairs, and not for use in litigation. *See*, *e.g.*, *King v. Rhodes,* 1 Leach 24, 168 Eng. Rep. 115 (1742) (admitting into evidence ship's muster-book); *King v. Martin,* 2 Camp. 100, 101, 170 Eng. Rep. 1094, 1095 (1809) (vestry book); *King v. Aickles,* 1 Leach 390, 391-392, 168 Eng. Rep. 297, 298 (1785) (prison logbook).

Id. n.7.

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Id. at 2539-40. To repeat, maintenance records are not prepared specifically for use at trial. Therefore, the first sentence of the quotation above controls.